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SUPREME COURT, U. S.

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1745~~ 70-203

WESTERN FIDELITY CORPORATION, ET AL.,
Petitioners,

VERSUS

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WESTERN FIDELITY CORPORATION,
ET AL., Petitioners
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May, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Western Fidelity Corporation, *et al.*, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 10th Circuit entered in the above case on February 2, 1971. A Petition for Rehearing was denied on March 2, 1971.

OPINIONS BELOW

The opinion of the District Court for the Western District of Oklahoma was entered on the 21st day of January, 1970, and is unreported. The opinion of the Court of Appeals for the Tenth Circuit was entered on the 2nd day of February, 1971, and to date is unreported. The order of the Court of Appeals for the Tenth Circuit denying Petitioner's Petition for Rehearing was entered on March 2, 1971, and to date is

unreported. Copies of the aforementioned opinions are appended to this Petition in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the 10th Circuit was made and entered on February 2, 1971; Petitioner's Petition for Rehearing was denied March 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Petitioners, Western Fidelity Corporation, *et al.*, instituted an action to recover under the term of a "blanket honesty" bond for certain amounts wrongfully paid from the Petitioner corporation by certain officers, directors, and employees of the Petitioner corporation. Said sums were paid to another corporation known as Deering Associates Church Finance Plan, Inc., and the employees, officers and directors of the Petitioner corporation, covered by the "blanket honesty" bond, were also officers and directors of Deering Associates Church Finance Plan, Inc. The sums wrongfully paid from the Petitioner corporation, were paid under the term of a certain "operational contract" between Petitioner corporation and Deering Associates. This contract was made between the two corporations, having interlocking directors, and alleged by the Petitioner corporation to be presumptively invalid and fraudulent, rendering the sums wrongfully paid from the Petitioner corporation to Deering Associates, a fraudulent payment, and thus invoking the terms of the "blanket honesty" bond. The District Court, in construing a contract made between two cor-

porations with an interlocking directorate which under Oklahoma law is presumptively invalid and fraudulent, found for the Defendant, stating that the contract was valid, and that no fraud could be found. The Court of Appeals affirmed the trial court's decision and subsequently denied Petitioner's Request for rehearing. The questions presented are:

1. Whether a contract entered into between two corporations, one of which is publicly held and the other privately held, which share common directors is presumptively invalid and fraudulent, and whether the burden of proving the validity of same is upon those seeking to uphold it.

2. When a contract is presumptively invalid by reason of the situation described in number 1 above, whether proof of the validity of such a contract must be by clear and convincing evidence.

3. Whether a blanket honesty bond covers the fraud and dishonesty of an employee of the insured when funds are knowingly and wrongfully paid out by that employee to a business or corporation not entitled thereto, without requiring that any personal profit to the employee be shown.

4. Whether, in an action upon a blanket honesty bond for losses incurred by reason of an employee's fraud and dishonesty, petitioner is entitled to judgment upon proof that funds were knowingly paid out by an employee to another person or corporation not entitled thereto, regardless of whether the employee is guilty of acts constituting moral turpitude.

5. Whether the assignment of a contract right requires a formal written instrument and notification to the contract debtor of the assignment to constitute a valid and binding assignment.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED

No constitutional provisions, treaties, statutes or regulations are involved in this case, all authority is set forth in case law.

STATEMENT OF FACTS

This action was brought by the Petitioner, Western Fidelity Corporation, against the Respondent, Insurance Company of North America. The District Court, in its findings of fact, found that the amount sought to be recovered by the Petitioner in this action was an amount in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. Further, that the Petitioner and subsidiary corporations were corporations organized and existing under the laws of the State of Oklahoma. The Insurance Company of North America, the Respondent, is a corporation incorporated under the laws of the State of Pennsylvania, having its principal place of business in Pennsylvania, duly authorized to transact a general insurance business in Oklahoma. Therefore, the court, under the provisions of 28 U.S.C. §1332(a)(1), found that it had jurisdiction of the parties and the subject matter of this action.

Western Fidelity Corporation is a publicly held corporation and all other corporate Plaintiffs are wholly owned

subsidiaries of Western Fidelity. At all times pertinent hereto, there existed an interlocking directorate between the directors of Western Fidelity Corporation and the directors of Deering Associates, a privately held corporation. Deering Associates was a privately held corporation which was principally owned by three of the third party Defendants in the original District Court action, Deering, Click, and Hoskins, who were also officers and directors of Western Fidelity.

The blanket honesty bond of INA, insuring Western Fidelity against the fraudulent act of its employees was admittedly enforced at all times pertinent hereto. The bond was first issued to Western Fidelity on March 1, 1961. At that time, knowledge was available to INA that an interlocking directorate existed between the publicly held Western Fidelity Corporation and the privately held Deering Associates group. The bond was issued without question and without any investigation of the books and records of either Western Fidelity Corporation or Deering Associates, or any investigation of the dealings between the two corporations, even though INA insured both corporations. At the trial of this cause, the Defendant, INA offered no proof to the contrary.

On or about July 21, 1961, an instrument, styled "Operational Contract" was entered into between Western Fidelity Corporation and Deering Associates. This purported contract was executed by the third party Defendant, Claybron Deering, as President of Western Fidelity Corporation, and a member of the Board of Directors thereof, while Deering was also one of the principal owners of the other

party to the contract, Deering Associates. The contract was executed on behalf of Deering Associates by D. B. Hoskins as its President, even though Hoskins served, at that time, as President of Oklahoma Fidelity Corporation, one of Western Fidelity's wholly owned subsidiaries. Also present at the Board of Directors meetings of Western Fidelity Corporation, at which the "Operational Contract" was approved, and voting thereon, was Mr. Leon Penn, who disassociated himself in August of 1961 from the management of Western Fidelity Corporation, and subsequently became the certified public accountant who conducted the audits for both Western Fidelity Corporation and its wholly owned subsidiaries and Deering Associates.

Under the terms of this purported contract, Deering Associates was to encourage all churches with whom they contracted for supervisory service in establishing a church building bond campaign to place the installment financing of any church building bonds in the Western Fidelity Corporation. In return, Western Fidelity Corporation was to advance to Deering Associates from its own funds, upon presentation of a signed contract between Deering Associates and a particular church, the total amount of fee due Deering for services rendered under its contract with the church. Thereupon Deering was to *assign* the right to collect such fee to Western Fidelity Corporation to recover its cash advance either from voluntary payment made by the church, or by deducting the amount advanced to Deering Associates from the sum payable by Western Fidelity Corporation to the individual church for the face amount of the bonds received on the installment purchase plan.

From March 1, 1961, until April, 1966, the four third party Defendants in the original District Court action, Deering, Click, Hoskins and Radant, were the principal officers, directors and employees of Western Fidelity Corporation and its subsidiaries as well as serving in a similar capacity for Deering Associates. The third party Defendants, Claybron Deering and D. B. Hoskins, served in various executive directory capacities in Western Fidelity Corporation and its subsidiaries, while the third party Defendants, John Click and M. H. Radant, were in charge of keeping the books of Western Fidelity Corporation and its subsidiaries, even though they handled the same function for Deering Associates. It is thus undisputed that each of the third party Defendants in the original District Court action had knowledge of all matters pertaining to the business relations between Western Fidelity Corporation and its subsidiaries and Deering Associates, including the accounting for and collection of advances made from Western Fidelity Corporation to Deering Associates pursuant to the purported "Operational Contract."

It is undisputed that the terms of the "Operational Contract" were never followed by the third party Defendants. Once Deering entered into a contract with a church for the organization and supervision of a church building bond campaign, such contract was immediately relied upon as the basis of a request for a withdrawal of funds, equal in amount to that fee contingently due Deering Associates *if a bond issue were ever consummated, and if all bonds contemplated to be sold thereunder were sold.*

At no time during the course of dealing between Western Fidelity Corporation and its subsidiaries and Deering

Associates were cash advances made to Deering based upon the amount purportedly due Deering on any one contract with an individual church.

However, no proof was adduced at the trial herein that an assignment of *any contract right* to fee due Deering Associates from any church was *ever given to Western Fidelity Corporation* or its subsidiaries at any time. This fact remained unknown to the stockholders and impartial directors of Western Fidelity Corporation and its subsidiaries because of the fact that the entries were made into "fees receivable churches" account, which appeared as an asset on the balance sheet of Western Fidelity Corporation and its subsidiaries, indicating that proper assignments of the contract rights of Deering Associates to receive a fee from churches on supervisory contracts had been given. Not until an independent audit of the books and records of Western Fidelity Corporation and its subsidiaries was conducted was it discovered there was not and never had been any assignment of these accounts; nor, in the majority of cases, had the churches supposedly responsible for the payment of these fees been notified of any such assignment.

After the Western Fidelity Corporation and its subsidiaries and Deering Associates had operated under the system of business relations outlined herein, with such relations being reflected on the books and records of Western Fidelity Corporation as has been set out, this relation was called into question by the Oklahoma Securities Commission. Secondary offerings of the Western Fidelity Corporation stock were suspended pending clarification of the relationship and the amount owing between Western Fidelity Corporation and its subsidiaries and Deering Associ-

ates. An explanation of this restraining order was requested at the annual stockholders meeting of Western Fidelity Corporation held on April 4, 1964. At such time, the third party Defendant, Deering, being President of Western Fidelity Corporation, represented to the stockholders that the figure which appeared on the corporation balance sheet of February 15, 1964, showing Deering Associates indebted to Western Fidelity Corporation in the amount of Forty Thousand Eight Hundred Thirteen Dollars Eighteen Cents ($40,813.18) was incorrect.

The stockholders of Western Fidelity Corporation did, on that date, as was obviously intended by Deering, rely upon his representation as to the true financial relations and status of indebtedness between Western Fidelity Corporation and Deering Associates, and did ratify and reaffirm the arrangement under the "Operational Contract" of July 21, 1961.

During the period between April, 1964 and April, 1966, the third party Defendants were thus able to wrongfully withdraw additional funds from the cash resources of Western Fidelity Corporation and its subsidiaries to the detriment of the corporation. It was undisputed at trial, and the court so held that the sum of One Hundred Ninety-Three Thousand, Five Hundred Seventy-Nine Dollars ($193,579.00) was withdrawn from the Western Fidelity Corporation and its subsidiaries during the period in question and not returned by Deering Associates.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because both the 10th Circuit and the District Court erroneously failed to apply applicable Oklahoma law that a contract entered into between two corporations, one of which is publicly held and one privately held and share common directors, is presumptively invalid and fraudulent and must be proven by clear and convincing evidence. The proof by clear and convincing evidence was lacking in the trial court proceedings and the 10th Circuit affirmed the trial court's findings, said findings based on the record which lacked clear and convincing evidence to rebut the presumption that the "Operational Contract" was invalid and fraudulent.

Such ruling is likewise contrary to this Court's ruling in the decision of *Geddes* v. *Anaconda Copper Mining Company*, 254 U.S. 590, 41 S.Ct. 209, 65 L.Ed. 525 (1921).

Further, the decision below should be reversed because by affirming of the trial court's findings, a strict and narrow interpretation was given to the words "dishonest" and "fraudulent" as used in the fidelity bond, in direct conflict with the 4th Circuit's interpretation of the words "dishonest" and "fraudulent" as used in fidelity bonds, set forth in the case of *Brandon* v. *Holman*, 41 F.2d 586 (4th Cir. 1930).

1. An examination of the Oklahoma decisions regarding the burden of proof necessary to overcome the presumption of fraud under a contract entered into between corporations possessing common directorate, is clear. In order to overcome the presumption of fraud under a contract and any subsequent transactions thereunder entered

into between two corporations, one of which is publicly held and one of which is privately held, which possesses common directorates, the fairness of the original contract and all transactions thereunder must be established by clear and convincing evidence.

The Oklahoma rule is well set out in the decision of *Illinois Oil Company* v. *Pender*, 137 Okla. 82, 277 Pac. 1026 (1928), in which a suit was brought for fraud arising out of transactions between two corporations which were conducted by a common manager and agent. The Court stated:

> "In these circumstances, the principle of law here involved is as stated by this Court in the decision of *Bentley, et al* v. *Zelma Oil Company, et al*, 76 Okl. 116, 184 P. 131: 'a contract between two corporations, affected by votes of directors to both, is presumptively invalid and can only be sustained by an affirmative showing of the fairness and good faith.' In the case of *Mathison Alkali Works* v. *Arnold, Hoffman and Company*, 280 F. 132, it is said: 'there is a strong presumption against the validity of transactions between corporations, where conducted entirely through the agency of officers acting at the same time for both corporations, and the burden is on those who would maintain the transaction to show their entire fairness.'" 137 Okla. 82 at page 85.

Federal Courts in Oklahoma have also followed the reasoning of the *Illinois Oil* case consistently. For example in *Palmer* v. *Stokely*, 255 F.Supp. 674 (W.D. Okla. 1966), the Court stated:

> "The officers and directors of corporations act in a fiduciary capacity and where a transaction or contract is entered into between corporations having officers or

directors in common, the circumstances will be considered and the transaction will be jealously regarded by the Court."

Thus, the Oklahoma rule as to burden of proof required is clear. The character of proof induced by the Respondent in this regard fell woefully short of establishing any such fairness. The District Court failed to apply the standard as to burden of proof required by Oklahoma law, and the 10th Circuit, by its affirmance of the trial court's opinion, also failed to apply the standard of burden of proof required by Oklahoma law, as set forth in a long line of authority. The ruling was likewise contrary to this Court's ruling in *Geddes* v. *Anaconda Copper Mining Company*, 254 U.S. 590, 41 S.Ct. 209, 65 L.Ed. 525 (1921), which stated:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who maintain them to show entire fairness. . . . Especially is this true where a common director is *dominating* in *influence* or in *character*. This Court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy (citations omitted)." 254 U.S. 590 at page 599. (Emphasis added.)

2. The court below, by its affirmance of the trial court findings, construed the words "dishonest" and "fraudulent" as used in fidelity bond in a narrow and strict manner.

This decision is in direct conflict with a decision of the 4th Circuit, as set forth in the *Brandon* case, *supra,* which construes the terms "dishonest" and "fraudulent" as used in fidelity bonds to have a broader and more comprehensive meaning than the term "criminal" and include acts which show a want of integrity or breach of trust. It was submitted to the trial court and in the court below that the decision of the *Brandon* case, *supra,* is directly in point and applicable to the case herein. In the *Brandon* case, *supra,* the cashier of a bank caused funds of the bank to be paid to a business which was not entitled to receive bank funds. It was not shown that the cashier personally profited therefrom. The 4th Circuit held that the meaning of fraud and dishonesty extends beyond acts which would be criminal and that such terms are to be given a broad meaning and to be construed most strongly against the surety company.

The court below, by its affirmance of the trial court required the proof of fraud and dishonesty in the most strict sense, in direct conflict with the construction of the term set forth by the 4th Circuit.

Thus, this Court should grant review of the decision below by reason of the fact that the court below, by its affirmance of the trial court decision, failed to apply the applicable Oklahoma law as to burden of proof required to rebut the presumption of fraud, and by its holding is in direct conflict with the standard of burden of proof required by the decisions of the Oklahoma Supreme Court and this Honorable Court.

Further, the court below by its affirmance of the trial court decision, has given a narrow construction to the

meaning of the terms "dishonest" and "fraudulent" as used in fidelity bonds, said meaning being in direct conflict with the meaning given to the term by the 4th Circuit. In either situation, this Court should grant review.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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May, 1971

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WESTERN FIDELITY CORPORATION, a corporation, for itself and OKLAHOMA FIDELITY CORPORATION, a corporation, FIDELITY ACCEPTANCE CORPORATION, a corporation, and WEBSTER INVESTMENT CORPORATION, a corporation, Plaintiffs, vs.	
INSURANCE COMPANY OF NORTH AMERICA, a corporation, Defendant,	NO. CIV. 67-282
INSURANCE COMPANY OF NORTH AMERICA, Third Party Plaintiff, vs.	
CLAYBRON DEERING, D. B. HOSKINS, JOHN R. CLICK and M. H. RADANT, Third Party Defendants.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 5th day of January, 1970 the above styled cause came on for non-jury trial in its regular order, pursuant to assignment, the plaintiffs appeared by their President, P. M. Williams and their attorneys, Kerr, Davis, Irvine, Burbage & Foster, with appearances entered by Ted D. Foster, Jr., Larry D. Patton, Paul F. Fernald and Mr. Gregory Duggan; defendant, Insurance Company of North America, appeared by its Oklahoma Manager, Thomas W. Haynes,

and by its attorneys, Fenton, Fenton, Smith, Reneau & Moon, with appearances entered by Edgar Fenton and Robert J. Petrick; the third party defendants D. B. Hoskins, Claybron Deering, John R. Click and M. H. Radant appear personally and by their attorneys, Miller, Wilson, Adams & Spencer with an appearance entered by Woodrow W. Adams.

All parties announced ready for trial whereupon plaintiffs introduced evidence and rested; the defendant Insurance Company of North America commenced the introduction of evidence and following a recess to the 6th day of January, 1970, the said defendant completed introduction of its evidence and rested. Plaintiffs then introduced evidence in rebuttal and rested. All parties then rested. The Court now makes and enters its findings of fact and conclusions of law and judgment.

FINDINGS OF FACT

1. This action was commenced by the plaintiff Western Fidelity Corporation for itself and Oklahoma Fidelity Corporation, Fidelity Acceptance Corporation, and Webster Investment Corporation, subsidiary corporations, against Insurance Company of North America to recover on a certain Blanket Honesty Bond alleging dishonest and fraudulent acts on the part of employees of plaintiff. Plaintiff's answers to defendant's interrogatories identified the third party defendants, Claybron Deering, D. B. Hoskins, John R. Click and M. H. Radant as the parties referred to in the complaint. The defendant as third party plaintiff joined the third party defendants.

Plaintiff and the subsidiary corporations, for whose benefit the action is brought, are corporations organized and existing under the laws of the State of Oklahoma. Insurance Company of North America is a corporation incorporated under the laws of the State of Penisylvania, having its principal place of business in Pennsylvania and

is duly authorized to transact a general insurance business in Oklahoma.

The third party defendants, D. B. Hoskins and M. H. Radant were at the time of the commencement of this action citizens and residents of the State of Oklahoma. The third party defendant Claybron Deering was a citizen and resident of the State of California at the time of the commencement of this action. Third party defendant John R. Click was a citizen and resident of the State of Arizona at the time of the commencement of this action.

It is sought by plaintiff to recover in this action an amount in excess of $10,000.00, exclusive of interest and costs. The Court therefore finds it has jurisdiction of the parties and the subject matter of this action.

2. Defendant Insurance Company of North America issued to plaintiff and the subsidiary corporations, for whose benefit this action is brought, hereinafter referred to as Western Fidelity or as plaintiffs, a certain fidelity bond designated as a Blanket Honesty Bond, effective in 1961 and which was renewed annually the last renewals being effective on March 1, 1965 and March 1, 1966.

The bond sued upon insures and the defendant surety agreed to indemnify the plaintiff:

> "Against any loss of money or other property, belonging to the insured or in which the insured has a pecuniary interest, or for which the insured is legally liable, or held by the insured in any capacity whether the insured is legally liable therefor or not, through any fraudulent or dishonest act or acts committed by any of the employees as defined in Section 3, acting alone or in collusion with others * * *."

The Court finds that the four third party defendants were employees as defined by Section 3 of the defendant's bond.

[APPENDIX]

On August 27, 1966 plaintiff notified defendant of the possibility of a loss under the bond and on November 22, 1966 defendant received from plaintiff an instrument designated as plaintiff's Proof of Loss making claim for the sum of $250,000.00 and alleging that by reason of dishonest and fraudulent acts of the four third party defendants, plaintiffs had sustained a loss in that amount.

Defendant disclaimed liability under the bond and this action was then commenced by plaintiffs.

While denying liability for any losses that may have been sustained by plaintiffs, defendant in the alternative joined the third party defendants claiming any right of recovery over against these parties in the event of an adverse judgment.

3. Some of the officers and directors of the plaintiff corporations were also officers and directors of Deering Associates Church Finance Plan Inc. which was engaged in promoting the construction of church buildings and improvements and which involved the issuance and sale of bonds by various churches for new construction or improvements. A contract was entered into in good faith on July 21, 1961 between plaintiff and Deering Associates Church Finance Plan, Inc. This contract was approved and authorized by the Board of Directors of the plaintiff corporation and was initiated by the plaintiff corporation. This contract provided generally for a detailed plan by which Deering Associates assisted churches in a plan for raising funds for new church structures and improvements. The plan contemplated the issuance of bonds by various churches, which were to be pledged by the purchasers thereof as security for payment of purchase money promissory notes executed by such bond purchasers, which notes were thereafter to be purchased by plaintiff corporation and its subsidiaries. The contract provided in part:

> "In consideration for, and in order that 'Deering' may mediate favorable conditions to the benefit of

'Corporation' for the schedule of paying out monies due to aforementioned churches; and, since said advantages might otherwise be denied to 'Corporation' if 'Deering' found it necessary to ask for immediate payment from said churches for services rendered; therefore, 'Corporation' agrees to advance to 'Deering' from its own funds the total amount of fees due 'Deering' by said churches for services rendered or to be rendered according to the contract; said advance of fees to 'Deering' by 'Corporation' will be made on demand upon the presentation of said contract between 'Deering' and said church, and when date of bond campaign has been set, whereupon 'Deering' will assign said collection of fees to 'Corporation' which will recoup its advance from any payment voluntarily made by said church, or at the time final settlement is made by 'Corporation' to the church, and when so requested by 'Corporation' 'Deering' will make available information as to the purchase of early maturing real estate secured bonds issued by said churches."

Prior to the execution of this contract Deering Associates had been assigning contracts to plaintiff or its subsidiaries and also to banks or other finance companies under similar arrangements. The operational contract between the parties required Deering Associates to procure financing business solely for the plaintiff and its subsidiaries.

This contract was performed in accordance with its provisions resulting in advances to Deering Associates by plaintiffs in the amount of fees due Deering Associates Church Finance Plan, Inc. from churches for services rendered in promotion of church bond programs. By this procedure provided for by the operational contract Western Fidelity and its subsidiary corporations obtained the business of financing church buildings and improvements through the promotional activities of Deering Associates Church Finance Plan, Inc. Prior to and after the institution

of the operational contract of July 21, 1961, defendant's Exhibit No. "1," certain bookkeeping and accounting practices were set up and did fully account for and fairly reflect the financial status and transactions between plaintiff corporations and Deering Associates.

From 1960 to 1966, there was promoted and obtained by Deering Associates approximately $16,000,000 of congregational obligations which were assigned to and/or recorded on the books of the plaintiff, and this was all put on the books by Deering Associates on a fee of 5%, or perhaps in some cases 6%. In order for Deering Associates to do what Deering Associates did do, the Court holds and finds it was necessary that the plaintiffs from time to time advance money against the work that Deering Associates was doing, and it is some of these advances that are now the basis of this plaintiff's lawsuit.

4. The practice of promoting the issuance and sale of bonds and financing of such construction through such bonds continued during the period from July 1, 1961 through 1966. During this period all transactions between Deering Associates and plaintiff corporations were reflected on the books of the latter and were known to the stockholders and directors of plaintiff corporations and ratified and approved by them.

The Court holds and finds therefore that the contractual relation and the relation between the plaintiff and Deering Associates was one that was made in its inception in perfect good faith.

The Court does find that there was no dishonesty on the part of these employees, the officers, directors, who are named as third party defendants.

The Court finds and holds that Deering Associates was at all times acting for the plaintiff as plaintiff's agent and acted in good faith to promote church mission expansion, to build and improve church plants.

5. Under the operational contract, plaintiffs were required to advance, and did advance, funds to Deering Associates for sums due Deering Associates on its fee contracts with various churches. The plaintiffs under the operational contract were to recoup such advances by deducting the amount of such fees from sums to be paid churches on its financing commitments, or to collect such fees directly from the various churches.

The Court holds and finds that there was advanced to Deering Associates by the plaintiff companies the sum of $193,579.00 in controversy here, and that all of these advances were in the church business, that the advances were not in fraud, but were based on marginal fees from the churches to Deering Associates, and were all based upon written contracts as between the churches and Deering Associates.

These advances were not withdrawals in fraud but were advances on actual fee contracts between churches and church congregations and Deering Associates, and these fee contracts were assigned in turn to the Western Fidelity group.

The Court is very much impressed with the testimony of James P. Luton. I think he really knew what he was talking about. His testimony was forthright and to the point. He understand exactly what the operations were and the operations were in full keeping with and in accordance with the operating contract—defendant's Exhibit "1."

6. The transactions between plaintiff corporations and Deering Associates were acts of management initiated and approved and ratified by the Directors and Stockholders of plaintiff corporations. There is no evidence of dishonest or fraudulent acts on the part of any of the third party defendants. So the Court finds that there was no concealment or fraudulent concealment at any place by any of the third party defendants.

7. The Court now comes to the item of the Golden Circle Gospel Foundation in the amount of $20,000.00. Now this Court back sometime ago issued a restraining order on application of the Securities & Exchange Commission. I remember it fairly well, but not too well.

That restraining order, if I remember right, was selling securities to different church groups based upon the proposition or sales talk "going to get some oil wells and pay a lot of these bonds off on oil well drilling and speculation."

I do not find from this evidence that this $20,000.00 was paid in fraud. In fact, the evidence on that is woefully short as to what it was, when it was, the circumstances under which it was advanced.

The evidence, the Court holds and finds, is not sufficient for this Court under this evidence to entertain a judgment as against the defendant company or as against Deering.

8. As to the claim relating to the Leland Waters item of $15,000.00, the best I can find from the evidence is that plaintiff through some of its efforts to increase its earnings and increase its assets decided to advance money. The money wound up in the hands of Leland Waters and Muneer Hassen's hot check was given to plaintiff to repay it for the monies advanced. There is no dishonesty about it on the part of the third party defendants, but from the Court's looking at it and what is before the Court, it was awfully foolish business; but certainly there is not any evidence of fraud or dishonesty that would warrant this Court entering, on this item, a judgment against the defendant Insurance Company of North America.

9. As to the item of $1,250.00 and D. B. Hoskins, other than some checks on that item, what happened here is that $1,250.00 was deposited in a bank in Athens, Texas to pay some bond interest coupons. The evidence was it was not necessary to do it, but they did it and again it was awfully

poor business; but there is no effort here, so far as I can see or find, to do it in fraud or do it in concealment. It was a withdrawal from the funds to do something with, and again it was a withdrawal in contemplation of a profit for the plaintiff and it did not work out right. There was no fraud or dishonesty.

10. The Court having found that there was no concealment, fraud or dishonesty on the part of any of the third party defendants; it makes no findings on the affirmative defenses of the defendant Insurance Company of North America as contained in the pre-trial order.

11. The Court further finds, that in view of the fact that it has found that plaintiffs have wholly failed to establish fraud or dishonesty on the part of any of the employees of the plaintiff corporations, the alternative suit of the Insurance Company of North America against the third party defendants, Deering, Hoskins, Click and Radant is now moot. The Insurance Company of North America has not presently sustained any loss for which it may seek indemnity. However, should it in the future sustain a loss or again be exposed to further suits on its bonds, nothing determined here shall prejudice its rights to seek indemnity from any third parties.

CONCLUSIONS OF LAW

1. The Court holds and finds for the defendant, Insurance Company of North America; and against the plaintiffs and holds and finds that there is no evidence that the third party defendants have in any degree overreached any of the companies for which they were joint officers and/or directors. The Court further holds and finds nothing dishonest from the evidence in the whole plan of operation established between the plaintiff corporations and Deering Associates Church Finance Plan, Inc.

2. For an act to be "dishonest" within the meaning of fidelity suretyship bonds, there must exist elements of moral turpitude or want of integrity.

The evidence in this case fails to establish fraud or dishonesty on the part of any of the third party defendants, and judgment should be made and entered for the defendant Insurance Company of North America.

3. The Court having concluded that judgment should be made and entered in favor of the defendant Insurance Company of North America, its third party claim against the third party defendants in the alternative and only in the event of an adverse judgment did not accrue and the third party complaint should be and is hereby dismissed without prejudice.

JUDGMENT

Judgment is hereby entered for the defendant, Insurance Company of North America, and against the plaintiffs and the alternative third party complaint of the Insurance Company of North America against the third party defendants is dismissed.

Dated this 21st day of January, 1970.

LUTHER BOHANON, District Judge

APPROVED AS TO FORM:

KERR, DAVIS, IRVINE, BURBAGE & FOSTER
By .....
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Attorneys for This Party Defendants

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
FEB 2 1971
Howard K. Phillips
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM — 1971

WESTERN FIDELITY CORPORATION, ET AL., Plaintiffs-Appellants,	)	
v.	)	No. 264-70
INSURANCE COMPANY OF NORTH AMERICA, Defendant-Appellee.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 67-282 Civ.)

Ted D. Foster, Jr. (Larry D. Patton and Paul F. Fernald, of Kerr, Davis, Irvine, Burbage and Foster, on the brief), for Plaintiffs-Appellants.

Edgar Fenton (Robert J. Petrick, of Fenton, Fenton, Smith, Reneau and Moon, on the brief), for Defendant-Appellee.

Before LEWIS, Chief Judge, McWILLIAMS, Circuit Judge, and BRATTON, District Judge.

McWILLIAMS, Circuit Judge.

[APPENDIX]

Western Fidelity Corporation, the insured, made claim against the Insurance Company of North America, the insurer, on an employee's fidelity bond, referred to by the parties as a blanket honesty bond, alleging that it had sustained loss through "fraudulent and dishonest acts" on the part of four of its employees. Trial to the court culminated in a judgment in favor of the insurer, and the insured, Western Fidelity Corporation, now seeks reversal of the judgment thus entered.

The loss allegedly sustained by Western Fidelity Corporation, hereinafter referred to as Western, concerns monies disbursed by the four employees of Western to Deering Associates Church Finance Plan, Inc., hereinafter referred to as Deering Associates. It is Western's theory of the case that these disbursements were unauthorized and that though the actions of the employees in question were not necessarily criminal in nature, they were nonetheless "fraudulent and dishonest" within the meaning of the blanket honesty bond. It is the basic position of the Insurance Company of North America, hereinafter referred to as the Insurance Company, that, contrary to the assertion of Western, the disbursements in question were authorized by a so-called "operational contract" entered into by Western and Deering Associates.

As indicated, the trial court found that the operational contract between Western and Deering Associates was a valid one; that the disbursements in question were therefore not unauthorized, but authorized; and that the actions of the four employees under consideration were not "fraudulent and dishonest" within the meaning of the blanket honesty bond.

In this court Western argues that the trial court as a matter of law should have entered judgment for it against the Insurance Company. Western's reasoning is as follows: (1) The contract between Western and Deering Associates is "presumptively invalid" because of interlocking director-

ates coupled with the fact that Western is a corporation whose stock is publicly owned, whereas Deering Associates' stock is privately held; (2) that he who would rely upon a contract between companies with interlocking directorates has the burden of proving the essential fairness of the contract and the good faith of the contracting parties by clear and convincing evidence and that the Insurance Company failed to meet this burden; (3) that because of the invalidity of the operational contract the disbursements in question were unauthorized; and (4) the actions of the four who disbursed these monies without valid authority to so do were therefore "fraudulent and dishonest" within the meaning of the blanket honesty bond.

Assuming, without deciding, the correctness of the premise upon which Western's argument is based, namely, that if the operational contract be invalid, then the disbursements were unauthorized and "fraudulent and dishonest" within the blanket honesty bond, the fact remains that the trial court has now made a finding that the contract between the two companies is a valid one made in "perfect good faith." The trial court in essence found that the contract between the companies was fair and just, noting that while under its terms some $600,000 was advanced by Western to Deering Associates, at the same time Deering Associates financed some $16,000,000 in "congregational obligations" through Western. As concerns the so-called interlocking directorates of Western and Deering Associates, we note that as of the date of the execution of the operational contract between the two companies, named July 21, 1961, there was only one person connected with Deering Associates who also was in any way associated as such with Western. In any event, though the evidence and most certainly the inferences properly deducible therefrom are in conflict, still there is evidence, and much of it, to support the trial court's finding and conclusion that the operational contract between Western and the Insurance Company is valid and that Western's

employees were not guilty of fraudulent and dishonest acts. Such being the state of the record, the trial court's finding in this regard must be upheld. Rudd Paint & Varnish Co. v. White, 403 F.2d 289 (10th Cir.), and West v. H. K. Ferguson, 382 F.2d 630 (10th Cir.).

Counsel for Western urges us to follow the rationale of Brandon v. Holman, 41 F.2d 586 (4th Cir.). That case in our view is quite distinguishable. It is true that in *Brandon* it was held that there had properly been a directed verdict for the insured against the insurer in an action on an employee's fidelity bond. However, the fidelity bond in that case was broader in its coverage than the one under consideration in the instant case. Moreover, as was pointed out in *Brandon*, there was "little or no dispute" about the facts, and the disbursements there in question were made without a semblance of authority. As indicated, such is not the situation in the instant case where, according to the Insurance Company and more importantly according to the trial court, the disbursements were made pursuant to a valid contract between Western and Deering Associates.

An additional argument advanced here by Western is that the Insurance Company is somehow estopped from denying liability because it allegedly had the means of ascertaining the overlapping directorate of Western and Deering Associates and the resulting invalidity of the operational contract between the two companies. This particular argument is disposed of by our determination that the trial court's finding of a valid operational contract between Western and Deering Associates must under the circumstances be upheld. Indeed, our determination of that particular point in and of itself disposes of virtually all of Western's several grounds of alleged error since Western's entire case in this court is based on the erroneous premise that the trial court as a matter of law had to declare the operational contract invalid.

Judgment affirmed.

APPENDIX C

JANUARY TERM — MARCH 2, 1971

Before Honorable David T. Lewis, Chief Judge; Honorable Robert H. McWilliams, Circuit Judge; and Honorable Howard C. Bratton, District Judge.

Western Fidelity Corporation, et al., Plaintiffs-Appellants,	)	
v.	)	No. 264-70
Insurance Company of North America, Defendant-Appellee.	)	

Upon consideration of the petition for rehearing, though not timely filed, it is the order of the court that said petition be and is hereby denied.

A true copy

Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By (illegible)
Deputy Clerk

(seal)